



Signed: September 08, 2011

EDWARD D. JELLEN  
U.S. Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

|                                   |   |                                       |
|-----------------------------------|---|---------------------------------------|
| In re:                            | ) | Case No. 11-48963-EDJ-11              |
| <b>ANDRONICO'S MARKETS, INC.,</b> | ) |                                       |
| A California Corporation, aka     | ) | Chapter 11                            |
| Andronico's Community Markets,    | ) |                                       |
|                                   | ) | Date: September 8, 2011               |
| Debtor.                           | ) | Time: 9:30 a.m.                       |
|                                   | ) | Place: United States Bankruptcy Court |
| 1200 Irving Street                | ) | 1300 Clay Street, Courtroom 215       |
| San Francisco, CA 94122           | ) | Oakland, CA 94612                     |
|                                   | ) | Judge: Honorable Edward D. Jellen     |
| Employer Tax I.D. No.: 94-1307395 | ) |                                       |

**FINAL ORDER (1) AUTHORIZING POST-PETITION  
FINANCING; (2) AUTHORIZING USE OF CASH COLLATERAL; (3) GRANTING ADEQUATE  
PROTECTION; (4) MODIFYING AUTOMATIC STAY; AND (5) GRANTING RELATED RELIEF**

Andronico's Markets Inc., a California corporation, the debtor and debtor in possession herein, (the "Debtor" or the "Company"), submitted its MOTION FOR INTERIM AND FINAL ORDERS (1) AUTHORIZING POST-PETITION FINANCING; (2) AUTHORIZING USE OF CASH COLLATERAL; (3) GRANTING ADEQUATE PROTECTION; (4) MODIFYING AUTOMATIC STAY; AND (5) GRANTING RELATED RELIEF (the "Motion") which came on for preliminary hearing on August 25, 2011 (the "Interim Hearing") and a final hearing on September 8, 2011 (the "Final Hearing") before the Honorable Edward D. Jellen, United States Bankruptcy Judge. The Debtor appeared by John Walshe Murray of

1 Murray & Murray, A Professional Corporation; RENWOOD ANDRONICO LENDING 1, LLC, a  
2 Delaware limited liability company (the “DIP Lender”) appeared by counsel Steven M. Hedberg of  
3 Perkins Coie LLP; the Official Committee of Unsecured Creditors (the “Committee”) appeared by  
4 counsel David A. Honig of Winston & Strawn LLP; other appearances were as stated in the record.  
5 The Court entered an interim order approving the relief requested in the Motion and as set forth on  
6 the record of the Interim Hearing (the “Interim Order”) on August 25, 2011. The Motion requests  
7 the entry of a final order (the “Final Order”):

8 (a) authorizing and approving, pursuant to sections 105, 361, 362, 363, and 364 of the  
9 United States Bankruptcy Code, 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”) and Rules 2002,  
10 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), postpetition  
11 financing (the “DIP Facility”), from Renwood Andronico Lending 1, LLC, a Delaware limited  
12 liability company, or its affiliates (together with its successors, assigns and transferees, the “DIP  
13 Lender”) to (i) fund, among other things, ongoing working capital needs of Debtor, and (ii) pay fees  
14 and expenses (including, without limitation, reasonable attorneys’ fees and expenses) owed to the  
15 DIP Lender under the DIP Facility and the other DIP Facility Documents (as defined below);

16 (b) authorizing Debtor to enter into and comply in all respects with the DIP Facility and  
17 the other DIP Facility Documents, and approval of all of the terms and conditions of the DIP Facility  
18 and the other DIP Facility Documents;

19 (c) requesting that the financing under the DIP Facility, including, without limitation, as  
20 to all principal, accrued interest, unpaid fees and expenses, indemnification, and all other amounts  
21 due from time to time under the documents referred to below, including the Obligations<sup>1</sup>  
22 (collectively, the “DIP Facility Obligations”):

23 (i) have priority, pursuant to section 364(c)(1) of the Bankruptcy Code, over any  
24 and all administrative expenses, subject only to the Carve-Out (as defined below), which allowed  
25 superpriority claims of the DIP Lender shall be payable from and have recourse to all prepetition and  
26 postpetition property of Debtor, as provided for herein; and

27 <sup>1</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the DIP  
28 Facility Documents.

1 (ii) pursuant to section 364(c)(2) of the Bankruptcy Code, be deemed to be  
2 secured by valid, binding, continuing, enforceable, fully perfected and unavoidable first priority  
3 senior security interests in, and liens upon (all such liens and security interests granted to the DIP  
4 Lender, pursuant to the Interim Order, this Final Order and the DIP Facility Documents, the "DIP  
5 Facility Liens"), all prepetition and postpetition assets of Debtor that are not subject to valid,  
6 perfected, enforceable and non-avoidable liens as of the Petition Date, whether now existing or  
7 hereafter acquired, including all of the real, personal and mixed property (including equity interests)  
8 and all monies and other property of any kind received on account thereof, and all proceeds thereof,  
9 in which DIP Facility Liens are granted whether pursuant to the Interim Order and Final Order, as  
10 applicable, the DIP Facility Documents, or otherwise, in each case as security for the DIP Facility  
11 Obligations (each of the foregoing, the "DIP Collateral"), but specifically being subject solely to the  
12 Carve-Out to the extent provided for below; and

13 (iii) pursuant to section 364(c)(3) of the Bankruptcy Code, be deemed to be  
14 secured by valid, binding, continuing, enforceable, fully perfected and unavoidable DIP Facility  
15 Liens upon all DIP Collateral that is subject only to valid, perfected, enforceable and non-avoidable  
16 liens in existence on the Petition Date or valid liens in existence on the Petition Date that are  
17 perfected subsequent to such commencement as permitted by section 546(b) of the Bankruptcy  
18 Code, but specifically being subject to the Carve-Out to the extent provided for below;

19 (d) authorizing and approving the use of "cash collateral" as such term is defined  
20 in section 363 of the Bankruptcy Code (the "Cash Collateral") in which the DIP Lender has an  
21 interest;

22 (e) authorizing and approving a grant, as of the Petition Date (defined below), the  
23 Adequate Protection Superpriority Claim (defined below) and Replacement Liens (defined below),  
24 to the extent of and as compensation for any Diminution in Value (defined below), as set forth more  
25 fully below and subject to the Carve-Out;

26 (f) modifying the automatic stay imposed by section 362 of the Bankruptcy Code to the  
27 extent necessary to implement and effectuate the terms and provisions of the DIP Facility, the  
28 Interim Order, this Final Order and the other DIP Facility Documents; and

1 (g) The Bankruptcy Court's waiving of any applicable stay (including under Bankruptcy  
2 Rule 6004) and providing for the immediate effectiveness of the Interim Order (to the extent not  
3 already effective) and this Final Order.

4 This Court having found that due and appropriate notice, under the circumstances, of the  
5 Motion, the relief requested therein, the material terms of the Interim Order, the Final Order, the  
6 Interim Hearing and the Final Hearing was provided by Debtor pursuant to Bankruptcy Rules  
7 4001(b) and 4001(c)(1), on the following parties: (a) the Office of the United States Trustee (the  
8 "U.S. Trustee"); (b) counsel to the DIP Lender; (c) Debtor's twenty (20) largest unsecured creditors;  
9 and (d) all parties known by Debtor to claim any lien on or security interest in any of Debtor's assets  
10 (collectively, the "Interim Notice Parties"); the Court having considered all the pleadings filed with  
11 this Court; and having overruled all unresolved objections to the relief requested in the Motion; and  
12 upon the record made by Debtor at the Interim Hearing and the Final Hearing, including the Motion  
13 and other filings and pleadings in the Bankruptcy Case, and after due deliberation and consideration  
14 and good and sufficient cause appearing therefore;

15 THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND  
16 CONCLUSIONS OF LAW:

17 A. Petition Date. On August 22, 2011 (the "Petition Date"), the Debtor filed a voluntary  
18 petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the  
19 Northern District of California, Oakland Division (the "Bankruptcy Court"). Debtor continues to  
20 operate its business and manage its properties as a debtor in possession pursuant to sections 1107  
21 and 1108 of the Bankruptcy Code.

22 B. Jurisdiction and Venue. This Court has core jurisdiction over Debtor's chapter 11  
23 case (the "Bankruptcy Case"), this Motion and the parties and property affected hereby pursuant to  
24 28 U.S.C. §§ 157(b) and 1334. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and  
25 1409.

26 C. Notice. Notice of the Interim Hearing, the Motion and proposed entry of this Final  
27 Order has been provided to the Interim Notice Parties, the Committee (defined below) and  
28 Committee counsel. Under the urgent circumstances, requisite notice of the Motion and the relief

1 requested thereby and the Interim Order and this Final Order has been provided in accordance with  
2 Bankruptcy Rules 4001(b) and (c) and 9014, which notice is sufficient for all purposes under the  
3 Bankruptcy Code and no further notice of, or hearing on, the Motion or this Final Order is necessary  
4 or required.

5 D. Creditors' Committee. On August 25, 2011, the U.S. Trustee appointed the  
6 Committee. The Committee is represented by counsel.

7 E. Debtor's Stipulation as to Existing Secured Debt. Subject to the limitations contained  
8 in paragraph 11 of this Final Order, the Debtor, for itself, its estate and all representatives of its  
9 estate, admits, stipulates, acknowledges and agrees that:

10 (a) As of the Petition Date, Debtor owed DIP Lender approximately  
11 \$29,945,493.70, consisting of principal of \$27,721,315.55, contingent liability for issued letters of  
12 credit of \$345,000.00, accrued interest of \$1,682,781.70, and attorney fees and expense  
13 reimbursement of \$197,000 (the "Prepetition Obligations"), pursuant to (i) the Credit Agreement  
14 dated as of February 14, 2007 between Debtor and Bank of the West, the predecessor to DIP Lender,  
15 as such agreement has been amended and modified from time to time and (ii) the Second Lien Credit  
16 Agreement dated as of February 14, 2007 between Debtor and Special Situations Investing, Inc., the  
17 predecessor to DIP Lender, as such agreement has been amended and modified from time to time  
18 (the "Prepetition Loan Agreements"). The Debtor hereby agrees that the DIP Lender has an allowed  
19 claim in the amount of the Prepetition Obligation without the necessity of filing a proof of claim.

20 (b) As collateral for the Prepetition Obligations, the DIP Lender has a first  
21 priority security interest in and lien upon (the "Prepetition Liens") all of the assets of the Debtor (the  
22 "Prepetition Collateral"), subject only to certain liens with priority over the Prepetition Liens.

23 (c) The Prepetition Obligations constitute the legal, valid and binding obligations  
24 of Debtor, enforceable in accordance with their terms (other than in respect of the stay of  
25 enforcement arising from section 362 of the Bankruptcy Code).

26 (d) No portion of the Prepetition Obligations is subject to avoidance,  
27 recharacterization, recovery or subordination pursuant to the Bankruptcy Code or applicable  
28 nonbankruptcy law.

1 (e) The Prepetition Liens in and to the Prepetition Collateral constitute valid,  
2 binding, enforceable, and perfected first-priority (subject only to certain liens with priority over the  
3 Prepetition Liens) liens in and to the Prepetition Collateral and are not subject to avoidance,  
4 reduction, recharacterization, disallowance, disgorgement, counterclaim, or subordination pursuant  
5 to the Bankruptcy Code or applicable non-bankruptcy law.

6 (f) Debtor hereby forever releases any claim, counterclaim, causes of action,  
7 defenses or setoff rights, whether arising under the Bankruptcy Code or otherwise, against the DIP  
8 Lender and its respective affiliates, partners, members, agents, officers, directors, employees,  
9 attorneys and advisors whether arising under or in connection with the Prepetition Loan Agreements,  
10 documents related thereto or the transactions contemplated thereunder, the Prepetition Obligations or  
11 the Prepetition Liens, including, without limitation, any right to assert any disgorgement or recovery.

12 (g) The foregoing acknowledgments, stipulations and agreements are subject only  
13 to the rights of the Committee pursuant to paragraph 11 below.

14 F. Findings Regarding Postpetition Financing

15 (a) Debtor's Request. Debtor has requested from the DIP Lender, and the DIP  
16 Lender is willing to extend, certain loans, advances and other financial accommodations, as more  
17 particularly described and on the terms and conditions set forth in this Final Order and the DIP  
18 Facility Documents.

19 (b) Need for Postpetition Financing. Good cause has been shown for entry of this  
20 Final Order. Debtor has an immediate need to obtain the DIP Facility in order to permit, among  
21 other things, the orderly continuation of the operation of its business, the management and  
22 preservation of Debtor's assets and properties, to maintain business relationships with lessors,  
23 suppliers, employees and customers, to make payroll, to satisfy other working capital and  
24 operational needs and to maintain the going concern value of Debtor's estate. Without such cash and  
25 credit, Debtor's estate would be irreparably harmed.

26 (c) No Credit Available on More Favorable Terms. Debtor represents that it is  
27 unable to obtain sufficient financing from sources other than the DIP Lender on terms more  
28 favorable than under the DIP Credit Agreement (as defined below and as attached to the

1 SUPPLEMENTAL CERTIFICATE OF COMPLIANCE WITH GUIDELINES FOR CASH COLLATERAL AND  
2 FINANCING STATEMENTS filed in support of the Motion, subject only to non-material modifications  
3 as may be agreed to by the parties thereto) and any and all documents and instruments delivered  
4 pursuant thereto or in connection therewith (inclusive of the DIP Credit Agreement, the "DIP  
5 Facility Documents") and is not able to obtain sufficient unsecured credit allowable as an  
6 administrative expense under section 503(b)(1) of the Bankruptcy Code. Debtor is also unable to  
7 obtain unsecured credit with the enhanced priority afforded by section 364(c)(1) of the Bankruptcy  
8 Code. New credit is unavailable to Debtor without providing the DIP Lender with (a) the DIP  
9 Facility Superpriority Claims, (b) the DIP Facility Liens as provided herein and in the DIP Facility  
10 Documents, and (c) the postpetition rights and remedies provided herein and in the DIP Facility  
11 Documents.

12 (d) Budget. Debtor has prepared and delivered the budget (the "Budget") to the  
13 DIP Lender, a copy of which Budget is attached to the Motion and the DIP Credit Agreement. The  
14 Budget has been thoroughly reviewed by Debtor and its management. Debtor represents that the  
15 Budget is achievable and will allow Debtor to operate its business and otherwise conduct its  
16 Bankruptcy Case. The DIP Lender is relying upon Debtor's compliance with the Budget in  
17 accordance with the Interim Order in determining to enter into the postpetition financing  
18 arrangements provided for herein and in the DIP Facility Documents.

19 (e) Business Judgment and Good Faith Pursuant to Section 364(e). Based on the  
20 record of the Interim Hearing, the terms of the DIP Facility Documents and this Final Order are fair,  
21 just and reasonable under the circumstances, ordinary and appropriate for secured financing to  
22 Debtor, reflect Debtor's exercise of prudent business judgment consistent with its fiduciary duties  
23 and constitute reasonably equivalent value and fair consideration. The terms of the DIP Credit  
24 Agreement and the other DIP Facility Documents have been negotiated in good faith and at arm's  
25 length between Debtor and the DIP Lender, with all parties represented by counsel, and any credit  
26 extended, loans made, and other financial accommodations extended to Debtor by the DIP Lender  
27 shall be deemed to have been extended, issued, or made, as the case may be, in "good faith" as that  
28 term is used in section 364(e) of the Bankruptcy Code and in express reliance upon the protections



1 afforded by section 364(e) of the Bankruptcy Code

2 (f) Good Cause, Immediate Entry. Debtor represents that the relief requested by  
3 the Motion is necessary, essential and appropriate and is in the best interests of and will benefit  
4 Debtor, its estate and its creditors as its implementation will, among other things, provide Debtor  
5 with the necessary liquidity to (i) minimize disruption to Debtor's business and on-going operations,  
6 (ii) preserve and maximize the value of Debtor's estate for the benefit of all of Debtor's creditors, and  
7 (iii) avoid immediate and irreparable harm to Debtor, its creditors, business, employees, and assets.  
8 Thus, good cause has been shown for the immediate entry of this Final Order pursuant to  
9 Bankruptcy Rules 4001(b)(2) and 4001(c)(2).

10 Such stipulations shall be binding on all parties and the estate except as provided in  
11 paragraph 11 of this Final Order.

12 G. Use of Cash Collateral and Proceeds of the DIP Facility, DIP Collateral and  
13 Prepetition Collateral. All Cash Collateral, all proceeds of the Prepetition Collateral and the DIP  
14 Collateral, including proceeds realized from a sale or disposition thereof, or from payment thereon,  
15 and all proceeds of the DIP Facility (net of any amounts used to pay fees, costs and expenses  
16 payable under this Final Order) shall be used and/or applied in accordance with the terms and  
17 conditions of this Final Order and the other DIP Facility Documents, for the types of expenditures in  
18 the Budget and for no other purpose.

19 H. Adequate Protection Lien for Prepetition Lender. The DIP Lender has negotiated in  
20 good faith regarding the Debtor's use of the Prepetition Collateral (including the Cash Collateral) to  
21 fund the administration of the Debtor's estate and continued operation of its businesses, in  
22 accordance with the terms hereof. The DIP Lender has agreed to permit the Debtor to use the  
23 Prepetition Collateral, including the Cash Collateral, in accordance with the terms hereof subject to  
24 the terms and conditions set forth herein, including the protections afforded parties acting in "good  
25 faith" under section 363(m) of the Bankruptcy Code. The DIP Lender is entitled to adequate  
26 protection as and to the extent set forth herein pursuant to sections 361, 362 and 363 of the  
27 Bankruptcy Code. Based on the Motion, the record presented to the Bankruptcy Court at the Interim  
28 Hearing, and the Final Hearing, the terms of the proposed adequate protection arrangements and of



1 the use of the Cash Collateral are fair and reasonable, reflect the Debtor's prudent exercise of  
2 business judgment and constitute reasonably equivalent value and fair consideration for the DIP  
3 Lender's consent thereto.

4 Based upon the foregoing, and after due consideration and good cause appearing therefore;  
5 IT IS ORDERED, ADJUDGED AND DECREED, that:

6 1. Motion Granted. The Motion is granted in accordance with Bankruptcy Rule  
7 4001(c)(2) to the extent provided in this Final Order. This Final Order shall immediately be  
8 effective upon its entry.

9 2. Objections Overruled. All objections to the entry of this Final Order are withdrawn  
10 or resolved by the terms hereof or, to the extent not resolved, are overruled.

11 3. Authorization of the DIP Financing Documents. The Debtor executed that certain  
12 Debtor in Possession Credit Agreement dated August 24, 2011 (the "DIP Credit Agreement") by and  
13 between Debtor and the DIP Lender. The parties acknowledge that as of the date of this Final Order,  
14 any Events of Default (as defined below) under the DIP Credit Agreement have been cured by the  
15 Debtor or waived by the DIP Lender including, but not limited to, any defaults arising as a result of  
16 the terms of the Bid Procedures Order. Provided that the Debtor is not in default under the terms of  
17 this Final Order, the Debtor is immediately authorized to borrow under the DIP Facility from the  
18 DIP Lender in an amount not to exceed \$5,000,000 and to continue to operate its business, in  
19 accordance with the terms of this Final Order, the DIP Credit Agreement and the DIP Facility  
20 Documents. Upon execution and delivery of the DIP Facility Documents, the DIP Facility  
21 Documents shall constitute and are hereby deemed to be legal, valid, and binding obligations of  
22 Debtor and Debtor's estate, enforceable against Debtor and its estate in accordance with the terms of  
23 the DIP Facility Documents.

24 4. Execution and Compliance with DIP Facility Documents; Conflicts. The Debtor is  
25 authorized and directed to do and perform all acts, to make, execute and deliver all instruments and  
26 documents (including, without limitation, the DIP Credit Agreement and additional security  
27 agreements, deeds of trust, mortgages and financing statements) and to pay, as such become due,  
28 fees and expenses that may be required or necessary for the Debtor's performance hereunder, and

1 under the DIP Credit Agreement including, without limitation fees and other expenses described in  
2 this Final Order, in the DIP Credit Agreement (other than fees and expenses of the Debtor's  
3 professionals, which fees and expenses may only be paid upon entry of an order of this Court).  
4 Except as modified by this Final Order, the Prepetition Loan Agreements shall remain in full force  
5 and effect with respect to the Prepetition Obligations, subject to the Committee's rights under  
6 paragraph 11 of this Final Order. To the extent there exists any conflict between the Motion, this  
7 Final Order, and the terms of the Prepetition Credit Agreements or the DIP Credit Agreement, this  
8 Final Order shall govern and control.

9       5.     DIP Facility Superpriority Claims. As security for the DIP Facility Obligations now  
10 existing or hereafter arising pursuant to the DIP Facility, the DIP Facility Documents, the Interim  
11 Order and this Final Order, to the extent the DIP Facility Liens do not satisfy the DIP Facility  
12 Obligations, the DIP Lender is granted an allowed super-priority administrative claim pursuant to  
13 section 364(c)(1) of the Bankruptcy Code, which claim shall have priority in right of payment over  
14 any and all other obligations, liabilities and indebtedness of Debtor, now in existence or hereafter  
15 incurred by Debtor, and over any and all administrative expenses or priority claims of the kind  
16 specified in, or ordered pursuant to, inter alia, sections 105, 326, 328, 330, 331, 503(b), 507(a),  
17 507(b), and/or 364(c)(1) of the Bankruptcy Code (the "DIP Facility Superpriority Claim"), whether  
18 or not such expenses or claims may become secured by a judgment lien or other non-consensual lien,  
19 levy or attachment, which allowed claim shall be payable from and have recourse to all prepetition  
20 and postpetition property of Debtor and all proceeds thereof, provided, however, that the DIP  
21 Facility Superpriority Claim shall be subordinate to the Carve-Out to the extent specifically provided  
22 for in paragraph 9 of this Final Order.

23       6.     DIP Facility Liens. As security for the DIP Facility Obligations, pursuant to sections  
24 364(c)(2) and (c)(3) of the Bankruptcy Code, the DIP Lender shall have, and is hereby granted  
25 (effective and perfected upon the date of this Final Order and without the necessity of the execution  
26 by Debtor or the filing or recordation of deeds of trust, mortgages, security agreements, control  
27 agreements, pledge agreements, lock box agreements financing statements, or otherwise) the DIP  
28 Facility Liens. Such liens and security interests shall not include (i) the retainers of professionals

1 appointed in the Bankruptcy Case, except to the extent those retainers are not exhausted, as more  
2 fully set forth in the DIP Credit Agreement and (ii) Avoidance Actions or the proceeds thereof. The  
3 DIP Facility Liens shall:

4 (a) pursuant to section 364(c)(2) of the Bankruptcy Code, be valid, perfected,  
5 enforceable and non-avoidable first priority liens on and security interests in all now owned or  
6 hereafter acquired assets and property of Debtor, that are not subject to valid, perfected, enforceable  
7 and non-avoidable liens as of the Petition Date;

8 (b) pursuant to section 364(c)(3) of the Bankruptcy Code be valid, perfected,  
9 enforceable and non-avoidable second priority or other junior liens on and security interests in all  
10 now owned or hereafter acquired assets and property of Debtor that are subject to valid, perfected,  
11 enforceable and non-avoidable liens in existence on the Petition Date or to valid liens in existence on  
12 the Petition Date that are perfected subsequent to such commencement as permitted by section  
13 546(b) of the Bankruptcy Code; and

14 (c) in the event of the occurrence of an Event of Default (as defined below), or an  
15 event that would constitute an Event of Default with the giving of notice or lapse of time, shall be  
16 subject only to the payment of the Carve-Out (as defined below).

17 7. Authorization and Approval to Use Cash Collateral and Proceeds of DIP Facility.

18 Subject to the terms and conditions of the Interim Order and this Final Order and the other DIP  
19 Facility Documents, and to the adequate protection granted to or for the benefit of the DIP Lender as  
20 hereinafter set forth, the Debtor is authorized to (a) use the Cash Collateral and (b) request and use  
21 proceeds of the DIP Facility Loan, in each case for the types of expenditures set forth in the Budget.  
22 The Budget may only be amended, supplemented, modified, restated, replaced, or extended in  
23 accordance with the DIP Facility Documents and the prior written consent of the DIP Lender.

24 8. Adequate Protection for Prepetition Secured Parties. As adequate protection for the  
25 interests of the DIP Lender in the Prepetition Collateral (including Cash Collateral), the DIP Lender  
26 shall receive adequate protection as follows:

27 (a) Replacement Liens. To the extent of, and in an aggregate amount equal to,  
28 the diminution in value of such interests, from and after the Petition Date, calculated in accordance

1 with section 506(a) of the Bankruptcy Code, resulting from, among other things, the use, sale or  
2 lease by the Debtor of the Prepetition Collateral (including the use of Cash Collateral), the granting  
3 of the DIP Facility Liens, and to the Carve-Out, or the imposition or enforcement of the automatic  
4 stay of section 362(a) of the Bankruptcy Code (collectively, "Diminution in Value"), the DIP Lender  
5 shall have pursuant to sections 361(2) and 364(c) of the Bankruptcy Code, replacement security  
6 interests in and liens upon all of the DIP Collateral (the "Replacement Liens"), which shall be (i)  
7 junior and subject to the DIP Facility Liens and (ii) junior and subject to all other properly perfected  
8 liens thereon. The Replacement Liens shall in all cases be subject to the Carve-Out.

9 (b) Adequate Protection Superpriority Claims. To the extent of the aggregate  
10 Diminution in Value, the DIP Lender shall have, subject to the payment of the Carve-Out, an  
11 allowed superpriority administrative expense claim (the "Adequate Protection Superpriority Claim")  
12 as provided for in section 507(b) of the Bankruptcy Code, immediately junior and subject to the DIP  
13 Facility Superpriority Claim, and payable from and having recourse to all DIP Collateral; provided,  
14 that the DIP Lender shall not receive or retain any payments, property, distribution or other amounts  
15 in respect of the Adequate Protection Superpriority Claim unless and until the DIP Facility  
16 Obligations and (without duplication) the DIP Facility Superpriority Claim have indefeasibly been  
17 paid in full in cash.

18 (c) Adequate Protection Payments, etc. The Debtor shall accrue from the Debtor  
19 when due, on a monthly basis, adequate protection payments in an amount equal to interest on the  
20 Prepetition Obligations, at the non-default rate provided for in the Prepetition Loan Documents.  
21 Such amounts shall be immediately due and payable in the event of a default under the DIP Credit  
22 Agreement.

23 9. Carve-Out. The liens, security interests and super-priority administrative expense  
24 claims of the DIP Lender, including the DIP Facility Liens, Prepetition Liens, Replacement Liens  
25 and any Adequate Protection Superpriority Claim, shall be subject to and subordinate to a carve-out  
26 for (i) compensation and expense reimbursement (including professional fees and expenses to the  
27 extent allowed in the Guidelines allowed to a trustee in any successor Chapter 7 case; (ii) fees  
28 payable to the U.S. Trustee pursuant to 28 U.S.C. § 1930(a)(6), and (iii) fees and expenses of

1 Debtor's and the Committee's professionals in the aggregate amount set forth in the Budget (as  
2 modified below in this Paragraph 9) under "Restructuring Expenses" (the "Carve-Out"); provided,  
3 however, that any payments actually made to the Professionals after the date hereof from application  
4 of retainers or otherwise, whether under sections 330 and 331 of the Bankruptcy Code or otherwise,  
5 shall reduce the Carve-Out on a dollar-for-dollar basis, irrespective of whether such payment was  
6 made pre-Event of Default or post-Event of Default, it being expressly understood that any  
7 prepetition retainers held by Professionals shall not count against, and shall not reduce, the Carve-  
8 Out. The Carve-Out shall be free and clear of all liens, claims and encumbrances granted hereunder  
9 and shall be subject only to the allowed claims of the Professionals for such fees and expenses as  
10 may be awarded by the Bankruptcy Court under sections 327 or 328 of the Bankruptcy Code;  
11 provided, however, the Carve-Out cannot be used for the payment or reimbursement of any fees or  
12 disbursements of Debtor incurred in connection with the assertion or joinder in any claim, counter-  
13 claim, action, proceeding, application, motion, objection, defense or other contested matter, the  
14 purpose of which is to seek any order, judgment, determination or similar relief invalidating, setting  
15 aside, avoiding, subordinating, in whole or in part, the DIP Facility Obligations or the Prepetition  
16 Obligations or lien and security interest securing the DIP Facility Obligations or the Prepetition  
17 Obligations. The Budget is hereby modified such that the line item allocated to the fees of counsel  
18 to the Committee is increased by \$50,000 and a line item for the fees of the financial advisor to the  
19 Committee is added in the amount of \$25,000.

20 10. Fees and Expenses of Professionals. So long as no Event of Default shall have  
21 occurred and be continuing or have occurred and be waived, Debtor shall be permitted to pay the  
22 compensation and reimbursement of fees and expenses allowed and payable under sections 328, 330  
23 and 331 of the Bankruptcy Code (but excluding fees and expenses of third party professionals  
24 employed by Committee members), as the same may be due and payable and as are otherwise  
25 permitted under this Final Order and the DIP Credit Agreement; including without limitation any  
26 payments reserved or made pursuant to the terms of the DIP Credit Agreement or any order  
27 authorizing the reservation or payment of professional fees and expenses. Nothing contained herein  
28 is intended to constitute, nor should be construed as consent to the allowance of any fees,

1 disbursements or expenses by any party and nothing herein shall affect the ability or right of Debtor,  
2 the DIP Lender, the Committee, the U.S. Trustee or any other party in interest to object to the  
3 allowance and payment of any amounts incurred or requested.

4 11. Prepetition Lien/Claim Challenge. The stipulations and admissions contained in this  
5 Final Order shall be binding upon Debtor and its estate in all circumstances. Subject to the terms of  
6 this paragraph, the Committee shall have the earlier of (i) forty-five (45) days from the entry of the  
7 order appointing counsel for the Committee or (ii) ninety (90) days from the formation of the  
8 Committee, subject to extension of the deadline for good cause shown by application to the Court,  
9 within which to commence an adversary proceeding (collectively, a “Prepetition Lien/Claim  
10 Challenge”) with respect to the validity, priority, extent, perfection, and enforceability of the  
11 Prepetition Liens or the Prepetition Obligations, or any other claims or causes of action against the  
12 DIP Lender relating to the Prepetition Loan. If such a Prepetition Lien/Claim Challenge is not  
13 timely commenced within such applicable period set forth above, (a) the stipulations contained in the  
14 Interim Order and this Final Order shall be irrevocably binding on the estate, the Committee and all  
15 parties in interest (including, without limitation, a receiver, administrator, or trustee appointed in the  
16 Bankruptcy Case or in any jurisdiction), (b) the Prepetition Liens or the Prepetition Obligations and  
17 the DIP Facility Liens upon and security interests in the DIP Collateral shall be recognized and  
18 allowed as valid, binding, in full force and effect, not subject to any claims, counterclaims, setoff or  
19 defenses and perfected, (c) the Committee and any other party in interest (including, without  
20 limitation, a receiver, administrator, or trustee appointed in the Bankruptcy Case or in any  
21 jurisdiction) shall thereafter be forever barred from bringing any Prepetition Lien/Claim Challenge,  
22 and (d) the DIP Lender and its respective agents, officers, directors and employees shall be deemed  
23 released and discharged from all claims and causes of action of any kind, nature or description  
24 arising at any time immediately prior to the Petition Date, and all of Debtor's acknowledgements,  
25 releases and waivers of claims granted to or in favor of the DIP Lender relating to the Prepetition  
26 Loan in accordance with this Final Order shall be binding upon all parties-in-interest in the  
27 Bankruptcy Case and/or in any subsequently converted case under Chapter 7 of the Bankruptcy  
28 Code. Pursuant to this Final Order, the Committee shall be granted standing to commence an action

1 with respect to the Prepetition Lien/Claim Challenge.

2 12. Restrictions on Use of Proceeds. The Debtor shall use the proceeds of the DIP  
3 Facility in accordance with the DIP Facility Documents, this Final Order and the Budget: (a) to  
4 support the working capital and general corporate purposes of Debtor, (b) to make any other  
5 payments permitted to be made by the Bankruptcy Code, in this Final Order or in any other order of  
6 this Court to the extent provided for under the DIP Facility Documents or consented to by the DIP  
7 Lender as provided in the DIP Facility Documents, and (c) to pay certain fees and expenses relating  
8 to the credit facilities established under the DIP Facility Documents.

9 13. Restrictions on Debtor. Other than the Carve-Out, no claim having a priority superior  
10 or pari passu with those granted by this Final Order to the DIP Lender shall be granted or permitted  
11 by any order of the Bankruptcy Court heretofore or hereafter entered in the Bankruptcy Case while  
12 any portion of the DIP Facility (or refinancing thereof) or the commitment thereunder remains  
13 outstanding without the express written consent of the DIP Lender. Except as may be expressly  
14 permitted by the DIP Credit Agreement, Debtor will not, at any time during the Bankruptcy Case,  
15 grant deeds of trust, mortgages, security interests, or liens in the DIP Collateral or any portion  
16 thereof to any other parties pursuant to section 364(d) of the Bankruptcy Code or otherwise without  
17 the express written consent of the DIP Lender. If the Debtor incurs purchase money debt, it will do  
18 so only with the written consent of the DIP Lender.

19 14. Events of Default. It shall be an Event of Default by Debtor under the DIP Facility if  
20 Debtor, among other things: (i) attempts to prime the DIP Lender, (ii) a trustee, receiver or examiner  
21 is appointed, and (iii) the conversion of the Bankruptcy Case to a case under chapter 7 of the  
22 Bankruptcy Code, (iv) the dismissal of the Bankruptcy Case by the Bankruptcy Court, (v) the Debtor  
23 has failed to meet any of the Borrower Milestones set forth in the DIP Credit Agreement, or (vi)  
24 there is an event of default under the DIP Credit Agreement.

25 15. Lien Perfection. This Final Order shall be sufficient and conclusive evidence of the  
26 validity, perfection and priority of the DIP Facility Liens and the Replacement Liens without the  
27 necessity of filing or recording any financing statement, deed of trust, mortgage, or other instrument  
28 or document which may otherwise be required under the law of any jurisdiction or the taking of any



1 other action to validate or perfect the DIP Facility Liens and the Replacement Liens or to entitle the  
2 DIP Facility Liens and the Replacement Liens to the priorities granted herein. Notwithstanding the  
3 foregoing, the DIP Lender may, in its sole discretion, file such financing statements, deeds of trust,  
4 mortgages, security agreements, notices of liens and other similar documents, and is hereby granted  
5 relief from the automatic stay of section 362 of the Bankruptcy Code in order to do so, and all such  
6 financing statements, deeds of trust, mortgages, security agreements, notices and other agreements or  
7 documents shall be deemed to have been filed or recorded as of the Petition Date. The Debtor shall  
8 execute and deliver to the DIP Lender all such financing statements, deeds of trust, mortgages,  
9 security agreements, notices and other documents as the DIP Lender may reasonably request to  
10 evidence, confirm, validate or perfect, or to insure the contemplated priority of, the DIP Facility  
11 Liens and the Replacement Liens. Nothing in this Final Order shall be construed as perfecting any  
12 lien, including the Replacement Lien and the DIP Facility Lien, in the event the Bankruptcy Case is  
13 dismissed or closed.

14 16. Modification of Automatic Stay. Subject only to the provisions of the DIP Credit  
15 Agreement and without further order from this Court, the automatic stay provisions of section 362 of  
16 the Bankruptcy Code are vacated and modified to the extent necessary to permit the DIP Lender to  
17 implement the provisions of the DIP Facility Documents and this Final Order.

18 17. Waiver of Claims under Section 506(c). So long as there is no default under the  
19 terms of this Final Order or the DIP Credit Agreement, except for the Carve-Out, no costs or  
20 expenses of administration that already have been incurred in the Chapter 11 Case shall be charged  
21 or asserted by the Debtor against DIP Lender, paid ahead of its claims or surcharged against its  
22 Collateral pursuant to section 506(c) of the Bankruptcy Code without the prior written consent of  
23 DIP Lender, and no such consent shall be implied from any other action, inaction, or acquiescence  
24 by DIP Lender in this proceeding, including, but not limited to, funding of Debtors' ongoing  
25 operations by the DIP Lender.

26 18. Binding Effect of Interim Order and DIP Facility Documents. The provisions of this  
27 Final Order and the DIP Facility Documents shall be binding upon and inure to the benefit all  
28 parties-in-interest in the Bankruptcy Case, including, without limitation, Debtor, the DIP Lender,

1 and the Committee and their respective successors and assigns (including, to the fullest extent  
2 permitted by applicable law, any Chapter 7 or Chapter 11 trustee hereinafter appointed or elected for  
3 the Debtor's estate, an examiner appointed pursuant to section 1104 of the Bankruptcy Code or any  
4 other fiduciary hereafter appointed as a legal representative of Debtor or with respect to the property  
5 of Debtor's estate); provided, however, that DIP Lender shall have no obligation to extend any  
6 financing to any Chapter 7 trustee or similar responsible person appointed for Debtor's estate

7       19.     Survival. The rights of the DIP Lender under the DIP Facility Documents or this  
8 Final Order, the provisions of this Final Order and any actions taken pursuant hereto shall survive  
9 the entry of any order (i) confirming a plan in the Bankruptcy Case (and, to the extent not satisfied in  
10 full in cash, the DIP Facility Obligations shall not be discharged by the entry of any such order, or  
11 pursuant to section 1141(d)(4) of the Bankruptcy Code), (ii) converting the Bankruptcy Case to a  
12 chapter 7 case or (iii) dismissing the Bankruptcy Case, and the terms and provisions of this Final  
13 Order as well as the DIP Facility Superpriority Claims and the DIP Facility Liens granted to and  
14 conferred upon the DIP Lender and the protection afforded to the DIP Lender pursuant to this Final  
15 Order and the DIP Facility Documents shall continue in full force and effect notwithstanding the  
16 entry of any such order, and such claims and liens shall maintain their priority as provided by this  
17 Final Order and the DIP Facility Documents and to the maximum extent permitted by law until all of  
18 the DIP Facility Obligations shall have been paid and satisfied in full in accordance with the  
19 provisions of the DIP Credit Agreement (and that such DIP Facility Liens, DIP Facility  
20 Superpriority Claims and other protections shall remain binding on all interested parties).

21       20.     Access to Debtor. Without limiting the rights of access and information afforded the  
22 DIP Lender under the DIP Facility Documents, Debtor shall permit representatives, agents and/or  
23 employees of the DIP Lender to have reasonable access to its premises and records during normal  
24 business hours (without unreasonable interference with the proper operation of Debtor's business)  
25 and shall cooperate, consult with, and provide to such representatives, agents and/or employees all  
26 such non-privileged information as they may reasonably request.

27       21.     Amendment to DIP Facility Documents. The DIP Lender, with the consent of  
28 Debtor, is authorized to amend and/or modify the DIP Credit Agreement or any other DIP Facility

Document, including the Budget, without the necessity of a hearing; provided that any such amendments or modifications must be in writing and served upon counsel for the Committee, the U.S. Trustee and all parties who filed requests for notices under Bankruptcy Rule 9010(b) or were entitled to notice under Bankruptcy Rule 2002; provided, further that if Debtor have not received any written objections to such amendments or modifications within five (5) Business Days after such service, Debtor shall be entitled to submit an order to the Bankruptcy Court, together with a copy of the proposed amendments or modifications and a certification that no objections have been received with the appropriate notice period. If the Bankruptcy Court is satisfied that no objections have been received it may enter the order as proposed.

22. Remedies upon Occurrence of Event of Default.

(a) The Debtor's authority to borrow pursuant to the terms of this Final Order shall terminate, without notice to the Debtor or further leave of Bankruptcy Court (i) automatically on October 31, 2011, or (ii) after an Event of Default (in either case, the "Termination Date"), unless, following the occurrence of an Event of Default, such authority is extended by the written agreement of the Debtor and the DIP Lender, provided, however, nothing herein shall obligate the DIP Lender to make any advances after the Termination Date. All outstanding amounts of the DIP Facility shall be due and payable on the Termination Date.

(b) Upon the occurrence of an Event of Default and at any time thereafter, the automatic stay imposed by Section 362(a) of the Bankruptcy Code shall be lifted with respect to the Lender at 5:00 p.m. (Pacific time) on the tenth day after written notice by the DIP Lender to the Debtor, the Debtor's counsel, the United States Trustee and counsel to the Committee, so that the DIP Lender may exercise any or all of the following rights and remedies: (A) all the rights and remedies of a secured party under the UCC and all other applicable law, all of which rights and remedies shall be cumulative and nonexclusive to the extent permitted by law; (B) all of the rights and remedies provided for in the Loan Documents; and (C) without notice, sell, lease, assign, grant an option or options to purchase or otherwise dispose of the DIP Collateral and Prepetition Collateral or any part thereof in one or more parcels at public or private sale, for cash, on credit or for future delivery, and upon such other terms as Lender deems commercially reasonable. Lender shall be

1 entitled to apply the proceeds of the Prepetition Collateral and the DIP Collateral in accordance with  
2 the provisions of the DIP Credit Agreement.

3 (c) Notwithstanding the occurrence of the Termination Date or anything herein to  
4 the contrary, all of the liens, rights, remedies, benefits and protections provided to the DIP Lender  
5 under this Final Order and under the DIP Credit Agreement, including, without limitation, the DIP  
6 Facility Liens, Replacement Liens, DIP Facility Superpriority Claim and Adequate Protection  
7 Superpriority Claim granted herein, shall survive the Termination Date.

8 23. Reservation of Rights. Entry of this Final Order shall not be deemed to prejudice any  
9 and all rights, remedies, claims and causes of action the DIP Lender may have against third parties,  
10 and shall not prejudice the rights of the DIP Lender from and after the entry of this Final Order to  
11 seek any other relief in the Bankruptcy Case. Entry of this Final Order shall not in any way  
12 constitute: (a) a preclusion or a waiver of any right of the DIP Lender to file, or to prosecute if  
13 already filed, a motion for relief from stay, a motion or request for other relief, including but not  
14 limited to any adversary proceeding; (b) agreement, consent, or acquiescence to the terms of any  
15 plan by virtue of any term or provision of this Final Order; (c) a preclusion or waiver to assert any  
16 other rights, remedies or defenses available to the DIP Lender, or to respond to any motion,  
17 application, proposal, or other action, all such rights, remedies, defenses and opportunities to  
18 respond being specifically reserved by the DIP Lender; or (d) a preclusion, waiver or modification of  
19 any rights or remedies that the DIP Lender has against any other person or entity.

20 24. Restrictions on Additional Financing. Until entry of the Final Order, all postpetition  
21 advances and other financial accommodations under the DIP Credit Agreement and the other DIP  
22 Facility Documents are made in reliance on this Final Order. If an order is entered at any time in the  
23 Bankruptcy Case or in any subsequently converted case under Chapter 7 of the Bankruptcy Code  
24 (other than the Final Order) which (a) authorizes the use of Cash Collateral or the sale, lease, or  
25 other disposition of property of Debtor's estate in which the DIP Lender has a lien or security  
26 interest, except as expressly permitted hereunder or in the DIP Facility Documents, or (b) authorizes  
27 under section 364 of the Bankruptcy Code the obtaining of credit or the incurring of indebtedness  
28 secured by a lien or security interest which is equal or senior to a lien or security interest in property

1 in which the DIP Lender holds a lien or security interest, or which is entitled to priority  
2 administrative claim status which is equal or superior to that granted to the DIP Lender herein, then,  
3 in each instance described in clauses (a) and (b) above, unless the DIP Lender (as is required by the  
4 DIP Credit Agreement) shall first have given its express prior written consent thereto, no such  
5 consent being implied from any other action, inaction or acquiescence by the DIP Lender, such  
6 order shall require that all DIP Facility Obligations first shall be indefeasibly paid in full in  
7 immediately available funds. The liens and security interests granted to or for the benefit of the DIP  
8 Lender hereunder and the rights of the DIP Lender pursuant to this Final Order and the DIP Facility  
9 Documents with respect to the DIP Facility Obligations and the DIP Collateral are cumulative and  
10 shall not be altered, modified, extended, impaired, or affected by any plan of reorganization of  
11 Debtor and, if the DIP Lender shall expressly consent in writing that the DIP Facility Obligations  
12 shall not be repaid in full upon confirmation and effectiveness thereof, shall continue after  
13 confirmation and effectiveness of any such plan.

14 25. No Modification or Stay of Interim Order. If any or all of the provisions of this Final  
15 Order or the DIP Facility Agreement are hereafter modified, vacated or stayed, such modification,  
16 vacation or stay shall not affect (a) the validity of any obligation, indebtedness or liability incurred  
17 by Debtor to the DIP Lender prior to the effective date of such modification, vacation or stay, or (b)  
18 the validity or enforceability of any security interest, lien, or priority authorized or created hereunder  
19 or pursuant to the DIP Facility Documents, as applicable. Notwithstanding any such modification,  
20 vacation or stay, any indebtedness, obligations or liabilities incurred by Debtor to the DIP Lender  
21 prior to the effective date of such modification, vacation or stay shall be governed in all respects by  
22 the original provisions of this Final Order; and the DIP Lender shall be entitled to all the rights,  
23 remedies, privileges and benefits granted herein with respect to all such indebtedness, obligations  
24 and/or liabilities..

25 26. Conflicting Provisions. Unless otherwise provided in this Final Order, to the extent  
26 the terms and conditions of the DIP Facility Documents are in conflict with the terms and conditions  
27 of this Final Order, the terms and conditions of this Final Order shall control.  
28

27. Effectiveness. Notwithstanding any Bankruptcy Rule to the contrary, the terms and conditions of this Final Order shall (a) be immediately enforceable, and (b) not be stayed absent the grant of such stay under Bankruptcy Rule 8005 after a hearing upon notice to Debtor and the DIP Lender.

**\*\*\*END OF ORDER\*\*\***

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**COURT SERVICE LIST**

**Debtor**

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